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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-295

FUR INFORMATION AND FASHION COUNCIL, INC. ASSOCIATED FUR MANUFACTURERS, INC., UNITED FUR MANUFACTURERS ASSOCIATION, INC., FUR WHOLESALERS ASSOCIATION OF AMERICA, INC., MASTER FURRIERS GUILD OF AMERICA, INC., FURRIERS JOINT COUNCIL, OLIVER GINTEL, INC., J. PALANKER & SONS, and FREEDMAN-LEVY, INC.,

Petitioners,

v.

E. F. TIMME & SON, INC.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Fur Information and Fashion Council, Inc., et al., plaintiffs-appellants in the Court below, pray that a writ of certiorari issue to review the judgment order of the United States Court of Appeals for the Second Circuit in the above entitled cause.

Opinions Below

The opinion of the District Court 364 F. Supp. 16 (S.D.N.Y. 1973), is printed in the Appendix hereto. (10-A-24-A) The as yet unreported decision of the United States Court of Appeals for the Second Circuit is also printed in the Appendix hereto. (1-A-19-A)

Jurisdiction

The judgment of the Court of Appeals was issued and entered on July 31, 1974. By motion, the mandate was stayed until September 18, 1974 in order for petitioners to file this petition.

The jurisdiction of this Court is based upon 28 U.S.C. § 1254(1) which provides for review by writ of certiorari of a case in the Courts of Appeals granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. Petitioners submit that the decision of the Court of Appeals is in conflict with the decisions of other Courts of Appeals on the same matter and that said Court of Appeals has misconstrued a part of a Federal Statute which has never been, but should be, construed by this Court.

Questions Presented for Review

1. Did the United States Court of Appeals for the Second Circuit err in interpreting the language of Section 43(a) of the Lanham Act (15 U.S.C., Section 1125a) by construing said Section to be applicable to false representations about ones *own goods*, only when they pertain to an *inherent quality* or *characteristic* thereof, despite the contradictory decisions of other Circuit Courts which have more broadly construed said Section?

2. Did the United States Court of Appeals for the Second Circuit err in holding despite the clear language of Section 43(a) of the Lanham Act (15 U.S.C. § 1125a) prohibiting damaging, false representations in connection with the entry into commerce of goods or services, that Section 43(a) is applicable to false representations about one's *own goods*, only when they pertain to an *inherent quality* or *characteristic* thereof?

3. Does the First Amendment allow advertisers to make false representations concerning their *own goods* and to willfully and falsely disparage an entire industry?

4. Did the Court of Appeals for the Second Circuit so far depart from the accepted and usual course of judicial proceedings, that exercise of supervision is called for, in finding that representations made in respondent's television advertising in connection with the sale of its *own goods*, were not false because the Court of Appeals was "convinced" that no potential purchasers would believe their false representations, despite specific findings by the District Court, that were not clearly erroneous, that respondent did, in fact, make such false representations?

Constitutional Provision, Statutes and Rules Involved

This case involves Amendment I of the Constitution of the United States; 15 U.S.C. § 1051 et seq, specifically, 15 U.S.C. § 1125(a); 16 U.S.C. § 1531 et seq.; 18 U.S.C. § 43; 28 U.S.C. § 1338 (62 Stat 930); 50 C.F.R. § 17, Appendix A (1973); Supreme Court Rule 19(1)(b), and Rule 65 of the Federal Rules of Civil Procedure. (The above are all printed in pertinent part at 25-A *et seq.*).

The pertinent section of the statute to be construed is 15 U.S.C. 1125(a):

(a) Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into com-

merce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situat , or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

Statement of the Case

This action was brought by petitioners to enjoin respondent from showing television commercials, broadcast nationally, which contained false implications that the buying of respondent's products would save tigers and leopards from being killed for use of their fur for garments and that petitioners and all those similarly situated are responsible for the illegal killing of said animals for commercial purposes. These implications are false since, as respondent knew, the Endangered Species Conservation Act, 16 U.S.C. 1531 et seq., protects tigers and leopards from being killed for such purposes, and as the District Court found, "a new tiger or leopard coat may not be purchased at this time in the United States" (14-A)

The jurisdictional basis alleged in the Complaint is the Trademark Act of 1946 (Title 15 U.S.C. § 1051 et seq.), particularly Section 43(a) thereof (15 U.S.C. § 1125a) and pendent jurisdiction is present by virtue of 28 U.S.C. 1338 (62 Stat. 930). This matter came before the District Court below on plaintiffs' Motion for a Preliminary Injunction

pending trial pursuant to Rule 65 of the Federal Rules of Civil Procedure to prevent the Respondent from broadcasting the commercials in question. An evidentiary hearing was held on the Motion and the Court pursuant to F.R. Civ. P. 65(a) (2), subsequent to the hearing on said motions, *sua sponte*, consolidated the hearing into a trial on the merits.

The District Court below, although castigating the Respondent and finding that "words are inadequate to describe the mordant effect of these ads on the viewer" and further finding that the representations and implications in the ads *are false*, dismissed the Complaint for failure to state a claim upon which relief may be granted. The Court stated:

"Recourse may not be had to the Courts to resolve the public issue raised by Timme's ads, notwithstanding their falsity" (22-A)

The basis of the District Court's holding was that notwithstanding the false representations made by Respondent in connection with the entry of its goods into commerce, the representations did not pertain to an *inherent characteristic or quality* of the goods and hence did not come within the purview of Section 43(a) of the Lanham Act.

The Court of Appeals affirmed the District Court's judgment as to its interpretation of the federal statute and in addition, found that there were *no* false representations made in connection with the entry of Respondent's goods in commerce.

The Writ Should be Allowed

The controlling issue presented in this case concerns the interpretation and application of Section 43(a) of the Lanham Act. (15 U.S.C. 1125a) Petitioners submit that

the decision by the Court of Appeals below significantly added to existing judicial confusion. Its construction of said section creates a direct conflict with the construction thereof by other Courts of Appeals.

Section 43(a) involves the right to relief in federal courts via a new federal remedy against a specific kind of unfair competition. In light of the growing impact of advertising on the American public, Section 43(a) has been used with ever-increasing frequency as a means of curbing competitive abuses, specifically, in the area of product advertising.[1] Therefore, judicial confusion as to the section's applicability should be resolved. As one court has recently noted:

> "* * *, it is perhaps regrettable that Section 43(a) of the Lanham Act has developed such a checkerboard complexion of apparently conflicting decisions in the Federal Courts. Perhaps this lack of consistency is best explained as being evidence of the fact that the judiciary has yet to reach the limits of the coverage of the Act. As noted by Judge Learned Hand, 'there is no part of the law which is more plastic than unfair competition, and what was not reckoned an actionable wrong 25 years ago may have become such today.'" *Skil Corporation* v. *Rockwell International Corp.*, 375 F. Supp. 777, 786 (N.D. Ill., 1974)

This Court has never construed Section 43(a) and if the conflict of Circuits is to be resolved, a definitive interpretation thereof by this Court is badly needed.

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1. "The past year saw further developments and refining of the scope of Section 43(a) as the courts continue to expand this federal unfair competition statute." *The Twenty-Sixth Year of Administration of the Lanham Trademark Act of 1946*, Walter J. Derenberg, 63 Trademark Reporter 333, 408 (1973).

The District Court below found the following with respect to the effect of the television commercials complained of:

> "Words are inadequate to describe the mordant effect of these ads on the viewer. In the Leopard Ad, a woman of fashion makes an insensitive reference to the fact that leopards are threatened with extinction, and requests her escort (not shown on camera) *to buy her one before it is too late.* Her self-indulgent and frivolous demeanor contrasts directly and unfavorably with the tone of the ecologist-announcer."[2] (Emphasis supplied)

The Court further commented:

> "The American fur industry has been attacked relentlessly by persons in the now fashionable ecology and environmentalist movement in the country, and has been deprecated by the various public figures and leaders of opinions."[3]

In order to provide a frame of reference in which to view the decision of the Court of Appeals below, the specific television ads complained of are set forth as described by the Courts below (4-A):

> "The Leopard Ad, sixty seconds in length, begins with color scenes of animals in their natural habitat, including hippopotami swimming, antelopes running in a pack and a leopard with her cub.
>
> The leopard is then viewed through what are apparently the sights of a large firearm. The scene fades. A gunshot is heard. The scene shifts to a cocktail party ostensibly in the United States. A

2. 16-A.
3. 17-A.

fashionably dressed woman admires the leopard coat of another. The voice of an unseen male speaks:

Man's Voice: There are too many women who want leopard coats in the world and too few leopards. Timme makes fake furs every bit as beautiful as the originals. We think people should wear our fake fur and leave the leopard coats where they belong, on leopards.

Woman: Buy me one before the jungle runs out of them.

Man's Voice: Timme. Makers of Timmetation Fake Furs, and fabrics for just about every thing else.

This is followed by a picture of examples of various other Timme fabrics used for upholstery and apparel.

The Tiger Ad, thirty seconds long, is to the same effect. A lovely girl appears in color next to a friendly and affectionate tiger. She says:

> He [the tiger] is wearing a real tiger coat. I'm wearing a fake fur by Timme. Although it's virtually impossible to tell the difference, a Timme fur costs far less money. Perhaps even more important, it didn't cost a tiger his life. The beauty of a Timme fake is that you can wear a beautiful coat and he [the tiger] can keep his.

This is followed by the voice of an unseen male, naming Timme as a maker of fake furs and fabrics."

The District Court below found that the ads contain the false innuendos that (1) by selecting defendant's imitation leopard and tiger fur over the natural fur of leopard and tiger for a garment, a customer will save money and save the life of a fur-bearing animal, and (2) that the American fur industry is responsible for the killing of endangered tigers and leopards, [and, by extension, are criminals]. To the extent that the ads imply a customer has a choice between real and artificial tiger and leopard fur, the ads are also false.[4]

Persons who would wear natural tiger or leopard coats [and, by extension, all who would wear natural fur] are portrayed as both anti-social and anti-environment.[5]

Finally, the District Court stated:

> "In defendant, we have an advertiser seeking to capitalize on two of the great issues of our time, ecology and environmentalism. It would exploit these issues for profit, at the expense of plaintiffs' good will in order to make use of its fabrics more fashionable, and at the same time, make the wearing of furs unfashionable or undesirable." (18-A)

The Court of Appeals below agreed with the District Court that *only* those false representations concerning one's own goods which relate to an "inherent quality or characteristic" thereof are within the purview of Section 43(a). The Court of Appeals disagreed with the District Court's findings of false implications and innuendos in Respondent's ads. See discussion *infra* p. 16.

4. 16-A.
5. 16-A.

Respondent's False Representations Relating to its Own Goods Come Within the Purview of Section 43(a)

Petitioner submits that Respondent clearly used false representations in its advertising concerning Respondent's *own goods*, albeit, not an inherent quality or characteristic thereof.

Assuming *arguendo*, that as found by the District Court, Respondent falsely advertised that by selecting a Timmetation fur over natural fur, a customer would save the life of a tiger and leopard, and that a customer in fact has a choice between real and artificial tiger and leopard furs, it is contended that the Court of Appeals' extremely narrow interpretation of Section 43(a) is contrary to the body of case law in other Circuits which have interpreted this section.

There is no reference in the statute to a necessity that the false representation must be about an "inherent quality or characteristic" of the goods advertised. The plain language of the statute would appear to be to the contrary.

The statute *supra* p. 3, speaks of "any false representation" that is used in connection with the goods, and goes on to include as one type of such false representation "words tending falsely to represent the same." Rather than limiting the statute to false representations as to inherent qualities of the goods, the wording of the statute makes it clear that such a representation is only one of many types of false representation that are actionable.

It was error to construe the statute so as to apply only to false representations as to an inherent characteristic of the goods. The language of the Act covers any false rep-representation made in connection with the offering of one's own goods which damages another, *or which is believed to be damaging*. Petitioners do not claim that false represen-

tations disparaging or relating to another or his goods are covered by 43(a), only those representations about one's own goods.

The Court of Appeals error in its affirmance of the District Court's construction of 43(a) results from the Court of Appeals having glossed over the fact that *one can make false representations with respect to one's own goods without necessarily referring to an inherent quality thereof.* The District Court below recognized that false representations were made by Respondent in connection with its *own goods*, albeit, not an *inherent* quality. The Court of Appeals apparently missed this crucial but baseless distinction made by the District Court.

In contrast to the narrow construction of the section made by the Court below, the Third Circuit, in *L'Aiglon Apparel* v. *Lana Lobell, Inc.*., 214 F. 2d 649 (3rd Cir. 1954), after commenting that it would doubt the propriety of resort to legislative history [with respect to Section 43(a)] even if that history suggested that Congress intended less than it said, stated (p. 651):

> "It seems to us that Congress has defined a statutory civil wrong of false representation of goods in commerce and has given a *broad class of suitors* injured or likely to be injured by such wrong, the right to relief in the federal courts. * * * Perhaps this statutory tort bears closest resemblance to the already noted tort of *false advertising* to the detriment of a competitor, as formulated by the American Law Institute out of the evolving common law of unfair competition."[6] [Emphasis added]

6. See *Alum-A-Fold Shutter Corp.* v. *Folding Shutter Corp.* 441 F. 2d 556 (5th Cir. 1971).

The Court of Appeals for the Fifth Circuit in the case of *Norman M. Morris Corp.* v. *Weinstein*, 466 F. 2d 137 (5th Cir. 1972), in interpreting the Section upheld an injunction where there was no reference to an inherent characteristic of the defendant's goods. There it was held that the false representation to retailers by a wholesaler that brand name watches contained a genuine guarantee from the manufacturer, was a violation of Section 43(a) of the Lanham Act. The Court in holding for plaintiff stated (p. 141):

> "The intent of Congress in enacting § 1125(a) [Sec. 43a] * * * dealing with false descriptions or representations of articles in commerce was clearly to fashion a new federal remedy against a particular kind of unfair competition that the common law had effectively protected. * * *"

In the *Norman Morris* case, *supra*, the false representation did not pertain to an inherent quality of the goods, the defendant's watches, but rather to a guarantee for such watches, which falsely purported to be the genuine guarantee of the watch maker but which was in fact the guarantee of the defendant.

The false representation about the guarantee helped to sell the goods, but again did not relate to some special or inherent quality of the watch. This interpretation of Section 43(a) by the Fifth Circuit Court of Appeals is applicable to the facts in the case at hand.

Here, as in *Norman Morris*, *supra*, the false representations in respondent's advertising were made to unfairly increase the sales of respondent's products. The representations may not relate to an inherent quality of the goods, but, again, they unfairly help respondent to sell its products. The false representations by respondent herein are far more

vicious and devastating than a misrepresentation about a quality of respondent's goods.[7]

Petitioners do not and did not contend that Respondent's willful and false representations that disparage Petitioners, by implying that they are criminals responsible for the killing of endangered animals, are covered by Section 43(a) of the Lanham Act. The false representations which disparage the petitioners are tortious conduct under New

7. In *Chanel, Inc.* v. *Smith,* F. Supp. , 178 U.S.P.Q. 630 (N.D. Cal. 1973), a case involving false advertising, the Court first held that plaintiff therein had failed to prove unfair competition in terms of passing off or palming off, but it then held the following (P. 633):

> [a] "Defendant is guilty of misrepresentation with respect to the assertion in its advertising * * * that [its perfume] duplicated 100% perfect the exact scent of 'Chanel No. 5'.
>
> [b] Defendant is guilty of misrepresentation with respect to the assertion in his advertising * * * that defendant performed a masterful breakdown of plaintiff's perfume and cologne.
>
> [c] Defendant is guilty of misrepresentation with respect to the assertion in its advertising * * * that it took years to find the secret of positive duplication of plaintiff's perfume and cologne bearing the name 'Chanel No. 5'.
>
> With respect to *each* of such misrepresentations * * * defendant is in violation of California Civil Code § 3369 and in *violation of 15 U.S.C.* § 1125(a)." (Emphasis added)

The above violations of 43(a) found in the "Chanel" case, *supra,* did not involve trademark infringement or palming off, nor for that matter, were each of them restricted to an inherent quality of defendant's goods. Perhaps misrepresentation [a] above could be found to apply to the scent of the defendant's goods, but misrepresentations [b] and [c] refer to an exaggeration of scientific tests engaged in by the defendant. Further, there is no indication whatsoever that the "Chanel" Court had ever contemplated restricting the coverage of 43(a) to misrepresentations referring to an inherent quality of the defendant's goods. See also, *Ames Publishing Co. et al.* v. *Walker Davis Publications, Inc et al.,* F. Supp. 182 U.S.P.Q. 46 (E.D. Pa. 1974).

York Law and should have been the subject of an injunction by the District Court below under the pendent jurisdiction clause of 28 U.S.C. 1338. However, since the Court, by its erroneous construction of 43(a) found that none of the defendant's false representations *even with respect to its own goods* were within the purview of 43(a), it did not have to exercise pendent jurisdiction over the disparagement issue.

The wrongful construction of 43(a) by the Court of Appeals below can be seen from the choice of cases referred to in its decision. The Court of Appeals completely ignored petitioner's reliance on the decisions in the Third and Fifth Circuits, *L'aiglon Apparel, Inc.* v. *Lana Lobell, supra,* and *Norman M. Morris Corp.* v. *Weinstein, supra* respectively. Instead, the only cases cited by the Court of Appeals on the question of construction of 43(a) are *Samson Crane Co.* v. *Union Nat'l Sales, Inc.*, 87 F. Supp. 218, 221-22 (D. Mass. 1949), *aff'd on opinion below*, 180 F. 2d 896 (1st Cir. 1950), and *Bernard Foods Industries, Inc.* v. *Dietene Co.*, 415 F. 2d 1279, 1282-84 (7th Cir. 1969), *cert. denied*, 397 U.S. 912 (1970).

The "*Samson Crane*" case, cited by the Court of Appeals (8-A) is a 1949 case, which construed the language of said section to cover *only* the misuse of trademarks or closely analogous situations. Not only has this constricted viewpoint been thoroughly distinguished by cases in other circuits, but the Court of Appeals below, by affirming the District Court's decision, itself rejects the restrictive "*Samson Crane*" *supra*, construction of 43(a).

As for the case of *Bernard Food Industries, Inc.* v. *Dietene Co.*, 415 F. 2d 1279 (7th Cir. 1969), cert. den. 382 U.S. 839, cited by the Court of Appeals (8-A) it is *totally inapposite* to the issues herein. That case held

simply that 43(a) does not apply where only the disparagement of a plaintiffs' goods is involved. In the case at hand, petitioners have not asked the Courts to interpret 43(a) in this manner, they are content to rely on pendent jurisdiction to cover the disparagement issue. The "Bernard Food" case, *supra*, never reached the issue of a defendant making false representations about his own goods, much less whether said representations pertained to an inherent quality thereof. Petitioners submit that the Court of Appeals completely missed the distinction made by the District Court between a false representation made in connection with the advertising of one's goods, (not those of another) and a false representation made in connection with the advertising of one's goods which pertains specifically to an inherent quality or characteristic thereof. It is precisely this artificial distinction which escaped the Court of Appeals and which led the Courts below to deny to Petitioners the relief they should have received under Section 43(a).

Nowhere in any of the cases cited by the Courts below is there a hint that misrepresentations made by an advertiser about or relating to his own goods must relate to an *inherent quality* or *characteristic* of said goods in order for 43(a) to apply. This is the kind of narrow interpretation of 43(a) that the majority of Courts dealing with 43(a) have railed against.

As can be seen from the above-cited cases, the concept that 43(a) applies only where a false representation regarding one's own goods is made with regard to an inherent quality of said goods, is not supported by the case law. Further, such a narrow construction of Section 43(a) illogically allows the kind of systematic and vicious false advertising in which respondent has indulged and which the District Court below recognized. The protection Petitioners seek in this action with regard to Section 43(a) is

limited to Respondent's misrepresentations about its *own goods, not those of Petitioners*, to wit, that the buying of Respondent's goods will aid the ecological movement since tigers and leopards (an endangered species) will be saved, and that there is a choice for the consumer between buying imitation tiger and leopard and real tiger and leopard garments. That such false representations do not relate to an inherent quality or characteristic of Respondent's goods, does not lessen the falsity or the impact of such representations.

The Representations Made by Respondent in its Advertising are Obviously False

The Court of Appeals disagreed with the District Court's findings that Respondent's ads were indeed false. Without wasting this Court's time with a long argument, it appears that the Court of Appeals based on a three minute viewing of the ads in chambers, seeks to avoid the obvious *raison d'etre* of the ads. The fact that leopards and tigers only exist in this country in zoos and circuses is seized upon by the Court of Appeals as the reason for it being "convinced" (6-A) that the ads carry no false implications. The Court assumes that since it knows leopards are not available it would be unrealistic for a consumer to believe that the buying of a fake tiger or leopard coat is saving a tiger or leopard from being killed. This logic, of course, overlooks the fact that tigers and leopards could be killed in other countries and their fur imported for use in garments. This is the implication for the consumer of the phrase "Buy me one before the jungle runs out of them". (4-A)

In view of the fact that there is disagreement between the Courts below, and the case was presented on a motion for preliminary injunction with no warning that a full

trial on the merits was not to be held, it was an abuse of discretion for the Court of Appeals to have overturned the District Court's finding of falsity which was not clearly erroneous and which was based on testimony that the public is not aware that tiger and leopard coats are not available for purchase.

Aside from the fact that such reasoning begs the question as to whether the representations or implications of Respondent's advertising are false; the insistence of Respondent in running such false ads belies the Court's beliefs

It should be noted that the leopard ad, which starts out with a mother and her cub in their natural habitat, the mother then being viewed in the cross-hairs of a rifle, and the sound of a rifle shot, implying the killing of the mother, is not inserted as a mere dramatic effect. The tranquil jungle scene, disrupted by the jarring rifle shot, is followed by a scene in which an *American* woman asks in a flippant manner with respect to a leopard fur coat, "Buy me one before the jungle runs out of them!"[8]

The entire run of comments in the leopard ad falsely implies that leopards are being killed for their fur, that American women can buy them, that the American fur industry kills them, that there is a choice of fake leopard skin and real, and that the buying of the fake leopard fur will save the real. This kind of false advertising is not done in order to stimulate the ecological juices of the buying public nor to make any public minded comment, rather it is done to take advantage in the most sleazy fashion of the genuine concern many citizens *do have* for the environment. The District Court below was repulsed by Respondent's ads and fully agreed with the above analysis.

8. 4-A.

Finally, the Court of Appeals' assertion that the impact of the ads would probably not have been lessened if Respondent had added a sentence at the end of its ad indicating that the federal government prohibited the importation of real tiger and leopard skins[9] (and that presumably Petitioners do not violate the law) is again contradicted by Respondent's own actions. Such a suggestion for a voice-over, or even some written disclaimer by Respondent was made by the District Court below and *rejected by Respondent.*

Since the Court of Appeals asserted that Respondent's ads were truthful or mere puffing, it did not deal with some of the subsidiary issues raised by the District Court below, including the applicability of the First Amendment. Therefore, while Petitioners have listed such issues in this Writ, it is submitted that in view of this Court's emphasis on brevity, said issues can be more fully covered should the Writ be allowed.

CONCLUSION

This Court should allow Petitioners' Writ since there is a genuine conflict between circuits on the proper construction and applicability of Section 43(a) of the Lanham Act. Section 43(a) has been the source of much litigation in recent years and the time is ripe for this Court to resolve the conflicting decisions of differing Courts of Appeals on this subject.

It is submitted that 43(a) has been the genesis of a new federal law of unfair competition with respect to the parameters of commercial advertising and is and can be a valuable tool to curb unwarranted abuses in this field. The majority of Courts considering the application of this section of the Lanham Act, have opted for a broad construction

9. 7-A.

in apparent recognition of its usefullness in curbing false advertising.

Judicial decisions concerning 43(a) range from the narrow minority view of the 1st Circuit as represented by "*Samson Crane*" *supra* to the broad construction given said section by the 3rd and 5th Circuits as represented respectively by *L'Aigion Apparel* v. *Lana Lobell, Inc., supra,* and *Norman M. Morris Corp.* v. *Weinstein, supra.*

The decision of the Court of Appeals below is contrary to the bulk of judicial decision on 43(a) and leaves an unnecessary loophole for those who wish to falsely advertise their goods.

There is no justification for holding that 43(a) applies to a false representation pertaining to an inherent quality of one's goods, but not to false representations which pertain to an effect the goods may have, or the amount sold, or to whom sold, or who guarantees them, etc.

In the case at hand, Respondent seeks to take unfair advantage of a recent public awareness of our ecological situation. It wishes to do this by *falsely implying* that the buying of its products will aid the environment by saving endangered species from being killed for their fur. The fact that such species are not being killed is hidden from the general populace and it is contended, despite the expressed belief of the Court of Appeals below, the average consumer is not aware of the practices of the Petitioners which are conservationist with respect to animals and our environment, nor that Petitioners have stringent trade regulations against the killing of *any endangered species.*

It is submitted that such false advertising is precisely the kind that falls within the ambit of Section 43(a) and that such representations are falsely made with respect to the entry of goods into commerce.

The decision of the Court of Appeals below was narrow and regressive, and not in keeping with the more enlightened interpretation of other Circuit Courts. Petitioners therefore request that this Court allow their Writ.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 970—September Term, 1973.

(Argued May 29, 1974 Decided July 31, 1974)

Docket No. 73-2687

FUR INFORMATION AND FASHION COUNCIL, INC., ASSOCIATED FUR MANUFACTURERS, INC., UNITED FUR MANUFACTURERS ASSOCIATION, INC., FUR WHOLESALERS ASSOCIATION OF AMERICA, INC., MASTER FURRIERS GUILD OF AMERICA, INC., FURRIERS JOINT COUNCIL, OLIVER GINTEL, INC., J. PALANKER & SONS and FREEDMAN-LEVY, INC.,

Plaintiffs-Appellants,

v.

E. F. TIMME & SON, INC.,

Defendant-Appellee.

Before:

MOORE and FEINBERG, *Circuit Judges,*
WEINFELD,* *District Judge.*

Appeal from the final judgment and order dismissing the complaint and denying plaintiffs' motion for a preliminary injunction, in an action for unfair competition and commercial disparagement based upon the Trademark Act of 1946. 15 U.S.C. Section 1051 *et seq.*, particularly Sec-

* Of the Southern District of New York, sitting by designation.

tion 1125(a) thereof, Hon. Charles L. Brieant, Jr., *Judge*, entered in the United States District Court for the Southern District of New York.

Judgment and order affirmed.

OLIVER P. HOWES, Jr., New York, N.Y. (Nims, Howes, Collison & Isner, New York, N.Y. and Kenneth R. Umans, of counsel), *for Plaintiffs-Appellants.*

CHARLES L. TROWBRIDGE, New York, N.Y. (Gifford, Woody, Carter & Hays, New York, N.Y., and Bondy & Schloss, New York, N.Y. and David E. Nierenberg, of counsel), *for Defendant-Appellee.*

MOORE, *Circuit Judge:*

Plaintiffs[1] appeal from a final judgment and order dismissing their complaint and denying their motion for a preliminary injunction.[2] There being no diversity of citizenship, jurisdiction was asserted under the Trademark Act of 1946 (the so-called Lanham Act), 15 U.S.C. § 1051 *et seq.*, Section 43(a), 15 U.S.C. § 1125a, of which contains the basis of, and prerequisites for, jurisdiction. In essence that section provides that any person who uses in connection with any goods any false representation, including words tending to falsely represent the same (such goods being entered into commerce) shall be liable in a civil

1. Plaintiffs include fur garment manufacturers, wholesalers, retailers, dealers and labor unions, and trade associations in the American fur industry.

2. The hearing on the preliminary injunction motion and the trial on the merits were consolidated by the trial court and resulted in the judgment entered on September 21, 1973.

action to any person damaged or likely to be damaged by "any such false description or representation."[3]

The complaint stated the suit to be "of a civil nature for unfair competition, and commercial disparagement." The defendant, E. F. Timme & Son, Inc., a manufacturer "of synthetic textile fabrics, some of which simulate in appearance the fur of wild and farm raised animals but which do not consist of or contain animal fur * * *" is charged with having "broadcast nationally, advertisements of defendant's said goods which carried the false implication that buying defendant's products would save tigers and leopards from being killed for use of their fur in garments despite defendant's knowledge that the Endangered Species Conservation Act, 16 U.S.C. 668a-668c, protects tigers and leopards from being killed for such purposes." (Complaint, par. 22). Additionally, plaintiffs assert an implication from these ads that "plaintiffs and all those similarly situated are responsible for the illegal killing of said animals for commercial purposes." (Complaint, par. 23). To bring the union employees into the "similarly situated" category, the complaint charges that "there will be a general loss of union jobs and depression of wages throughout the commercial fur industry" (Com-

3. § 1125. False designations of origin and false descriptions forbidden

(a) Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

plaint, par. 26), *i.e.*, if sales of the fur manufacturing industry are reduced.

The two television ads complained of are described in the trial court's opinion:

> The Court [the District Court] viewed these two Ads. They are produced in color. The fact that 40% of the New York market continues to view television in black and white was the significant motivation for the choice of leopard (with contrasting spots) and tiger (with stripes) over a monochromatic fur.
>
> The Leopard Ad, sixty seconds in length, begins with color scenes of animals in their natural habitat, including hippopotami swimming, antelopes running in a pack and a leopard with her cub.
>
> The leopard is then viewed through what are apparently the sights of a large firearm. The scene fades. A gunshot is heard. The scene shifts to a cocktail party ostensibly in the United States. A fashionably dressed woman admires the leopard coat of another. The voice of an unseen male speaks:
>
> > Man's Voice: There are too many women who want leopard coats in the world and too few leopards. Timme makes fake furs every bit as beautiful as the originals. We think people should wear our fake fur and leave the leopard coats where they belong, on leopards.
> >
> > Woman: Buy me one before the jungle runs out of them.
> >
> > Man's Voice: Timme. Makers of Timmetation Fake Furs, and fabrics for just about every thing else.
>
> This is followed by a picture of examples of various other Timme fabrics used for upholstery and apparel.

The Tiger Ad, thirty seconds long, is to the same effect. A lovely girl appears in color next to a friendly and affectionate tiger. She says:

> He [the tiger] is wearing a real tiger coat. I'm wearing a fake fur by Timme. Although it's virtually impossible to tell the difference, a Timme fur costs far less money. Perhaps even more important, it didn't cost a tiger his life. The beauty of a Timme fake is that you can wear a beautiful coat and he [the tiger] can keep his.

This is followed by the voice of an unseen male, naming Timme as a maker of fake furs and fabrics.

The trial judge then found:

> Words are inadequate to describe the mordant effect of these Ads on the viewer. In the Leopard Ad, a woman of fashion makes an insensitive reference to the fact that leopards are threatened with extinction, and requests her escort (not shown on camera) to buy her one before it is too late. Her self-indulgent attitude and frivolous demeanor contrasts directly and unfavorably with the words and tone of the ecologist-announcer.
>
> Persons who would wear natural tiger or leopard coats [and, by extension, all who would wear natural fur] are portrayed as anti-social, anti-environment, or otherwise in a bad light. The two-fold innuendo exists: (1) by selecting Timmetation fur over natural fur, a customer will save money and save the life of a fur bearing animal, and (2) that the American fur industry is responsible for the killing of endangered tigers and leopards [and, by extension, are criminals].

Notwithstanding these findings, the trial judge held that the complaint did not state a cause of action under Section

43(a) because the misrepresentations did not involve an inherent quality or false description of the defendant's own products. Alternatively, the judge ruled that the ads were protected by the First Amendment and that, in any event, the equities did not justify the award of preliminary injunctive relief.

At the outset, this court must observe that it disagrees with the trial court's findings of false implications and innuendoes. Since these findings consist primarily of inferences drawn from viewing the ads and since this court has also viewed them, the findings are subject not to the "clearly erroneous" test but to the stricter standard of review applicable to interpretations of documentary evidence. *See, e.g., United States ex rel. Lasky* v. *LaVallee*, 472 F. 2d 960, 963 (2d Cir. 1973); *Severi* v. *Seneca Coal & Iron Corp.*, 381 F. 2d 482, 488 (2d Cir. 1967); *Orvis* v. *Higgins*, 180 F. 2d 537, 539 (2d Cir.), *cert. denied*, 340 U.S. 810 (1950). Under this standard, the trial court's findings are erroneous and, accordingly, we set them aside. We are convinced that these ads carry no implications, false or otherwise, that plaintiffs, including their union employees, go about the country illegally killing tigers and leopards for commercial purposes. In fact, the court is prepared to take judicial notice that the numbers of tigers and leopards in this country is limited to zoological gardens and itinerant circuses. Equally unrealistic is the thought that a potential purchaser of one of defendant's imitation leopard coats makes the purchase with the thought that she (probably) is saving a leopard from being killed. To the contrary she knows that no real leopards are available—hence, if her desires compel her to appear in spots, she must resort to such imitation as is available. Furthermore, a cloth imitation of any fur is far less expensive and many purchasers for this reason are willing to compromise for less than the "real thing."

The ads seem to this court to do no more than to tout, in a rather pointed fashion, the advantages of imitation over natural furs: The imitation furs resemble the real thing, are less expensive, and can be purchased without necessitating the death of a live animal. These representations are either true or acceptable puffing. The fact that the particular animals pictured in the ads are endangered species whose skins may not be bought in this country seems beside the point. The impact of the ads on the real fur industry would probably not have been lessened if defendant had added a sentence of narrative indicating that the federal government, abhorring the wanton destruction of rare animals, had prohibited the importation of real tiger and leopard skins.

By one of the many miracles of modern science, fibers are produced from natural gas which can be fabricated into a textile material somewhat resembling fur. This textile material, in turn, can be treated so as to produce cloth having the appearance of the skins of tigers and leopards. Defendant has also capitalized on a play on words by merging its name "Timme" with "imitation" and using "Timmetation" as its name for its "fake furs." To the contrary of false representation, there is complete, truthful disclosure concerning defendant's products. The innuendoes sought to be drawn by plaintiffs from the other comments in the TV ads regarding tigers and leopards are without foundation.

Returning to Section 43(a), the only basis for jurisdiction, the statute specifically requires a "false description or representation" used "in connection with any goods or services." Since there are no false descriptions or representations concerning defendant's goods, plaintiffs take umbrage at the trial court's limitation of the statute to representations concerning "inherent quality or characteristic of defendant's product," claiming that such an inter-

pretation is unduly restrictive. We agree with the trial court's construction of Section 43(a), namely, that it was intended to apply only to misrepresentations relating to the inherent qualities of defendant's own goods. *See Samson Crane Co.* v. *Union Nat'l Sales, Inc.*, 87 F. Supp. 218, 221-22 (D. Mass. 1949), *aff'd on opinion below*, 180 F. 2d 896 (1st Cir. 1950); *Bernard Foods Industries, Inc.* v. *Dietene Co.*, 415 F. 2d 1279, 1282-84 (7th Cir. 1969), *cert. denied*, 397 U.S. 912 (1970).

From a reading of the statute itself, it seems quite obvious that its purpose was to prevent false descriptions of the goods being offered. Unfair competition, and commercial disparagement, except as they might be incidental to false representation, are not embraced within the statute. And in enacting Section 43(a), Congress could hardly have intended to flood the federal courts with claims that an advertiser had misrepresented the social desirability of its products or disparaged the ecological sensitivity of its competitors.

In final analysis, plaintiffs' real grievance is the fear (which they claim is already an actuality) that in this evermore-increasing environmentally conscious age, there is, will, or may be a popular revulsion against the killing of animals to provide for personal adornment. Whether this will eventuate is not for court speculation; it will depend upon the temper of the people as expressed through their legislative representatives. To the true environmentalist, the killing of any animal to make a fur garment may be repulsive. Plaintiffs themselves introduced ten letters from the public addressed to "The American Fur Industry" strongly disapproving of such killing, all apparently in reaction to a specific ad by the American Fur Industry promoting fur coats made of muskrat, Russian raccoon, Alaska seal and Norwegian Bluefox. Tigers and leopards were not the subject of the letters but lynx, mink, fox and sable.

We have in this country an enactment with respect to tigers and leopards, 16 U.S.C. secs. 668aa-cc, undoubtedly an attempt by our own laws to discourage slaughter in foreign lands. In former days we have had legislation to prevent the slaughter of birds about to become extinct whose plumage was coveted to adorn certain millinery headpieces when such were in vogue. More recently an entire industry (cigarettes) has been affected by restrictive legislation. The W.C.T.U. campaigned for decades not only to disparage but to wipe out, if possible, the hard liquor industry. Their dire prognostications of the deleterious effect of alcohol on the human race must have appeared—at least to the liquor industry and certain enthusiastic consumers of its products—to have been false. What additional animals or articles may be added to the proscribed lists will depend upon popular will. For the moment it is enough to say that the trial court's decision not to grant a preliminary injunction and to dismiss the complaint was wholly justified upon the law and the facts.

Since the second cause of action (tortious conduct under New York law) is concededly "pendent", the trial court properly allowed it to fall when its support was removed. We agree with his conclusion that such action, if any, as may exist, should be left for resolution by the state court, namely, the question "whether, under state law, a justiciable issue is presented."

In view of our decision that defendant's advertising of its products contained no false representations cognizable under Section 43(a), it is unnecessary to pass upon defendant's First Amendment arguments.

Judgment and order affirmed.

Memorandum and Order of Brieant, J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Brieant, J.

This action was commenced March 7, 1973 by nine corporate plaintiffs, suing for themselves and a purported class of persons said to comprise all those engaged in the American fur industry. No determination has yet been made by the Court as to whether the litigation may be maintained as a class action. Plaintiffs include a not-for-profit New York corporation, Fur Information and Fashion Council, Inc., which is a trade association of manufacturers, retailers, dealers and dressers of furs used in the apparel industry. This plaintiff, through its Fur Conservation Institute, and American Fur Industry divisions, conducts advertising and public relations campaigns in the interests of all segments of the American fur industry, and seeks to promote the use of furs by the ultimate consumer. Plaintiffs also include (1) and (2) two more trade associations, consisting of persons engaged in the fur manufacturing industry; (3) a trade association of fur wholesalers; (4) an association consisting of retailers; (5) a joint council of local labor unions within this District, whose members engage in the manufacture of fur garments; (6) a retailer of fur garments; (7) a fur garment manufacturer; and (8) a wholesaler of such apparel. The status and nature of activities conducted by the various plaintiffs are fully stated in paragraphs 3 through 15 of the Complaint.

Memorandum and Order of Brieant, J.

Defendant ("Timme") a New York corporation, manufactures synthetic yarn fabrics in various designs, collectively referred to as "Timme Fake Furs" or "Timmetation Fur".[1] It sells to the cutting trade, for the manufacture of wearing apparel, including imitation fur coats which have a physical appearance superficially resembling tiger, leopard, cheetah, jaguar, seal, ocelot and otter.

There is no divesity of citizenship. Jurisdiction is asserted based upon the Lanham Trademark Act of 1946, as amended. 15 U.S.C. § 1501-1127, and more specifically § 43(a) thereof [15 U.S.C. § 1125(a)] and 28 U.S.C. § 1338.[2]

By the first cause of action pleaded, plaintiffs show their financial stake, and that of the purported class, in the continued good will of their industry, and the public acceptance of real fur garments, and assert, without contradiction, that they and others have expended considerable money and effort in promoting their industry through institutional advertising and the use of professional public relations consultants.

Plaintiffs claim that they, and the purported class are specially aggrieved by defendant's conduct with respect to

1 Defendant's imitation furs are made from synthetic yarn derived from natural gas.

2 Section 43(a) of the Lanham Act provides in relevant part that:

"Any person who shall . . . use in connection with any goods . . . any false description or misrepresentation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods . . . to enter into commerce, and any person who shall with knowledge of the falsity of such . . . description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action . . . by any person who believes that he is or is likely to be damaged by the use of any such false description or representation."

its advertising program, claimed to be unlawful and in violation of the Lanham Act provisions previously cited.

As a second cause of action plaintiffs, seeking to impose tort liability, assert that (Complaint, ¶ 34):

> ". . . defendant has engaged in an intentional and systematic campaign to falsely and unfairly disparage (sic) the products marketed by plaintiffs and all others similarly situated and further to destroy the good will and reputation attached to the products. . . ."

This cause of action may not be maintained, except pursuant to pendent jurisdiction. (See *infra*, p. 19.)

On April 27, 1973, defendant answered the complaint by a general denial and six separate affirmative defenses.[3]

While the litigation was pending, and after a pre-trial conference had been held to explore settlement, or to expediate preparation of the case for trial, plaintiffs, by an order to show cause, issued September 6, 1973 by Judge Duffy of this Court, moved for a preliminary injunction pending trial, pursuant to Rule 65, F.R.Civ.P. which would in effect prevent the defendant from broadcasting over television in the New York area two (2) certain advertising commercials, in color, sometimes hereinafter referred to as

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3 These affirmative defenses are:

1. the complaint fails to state a claim;
2. plaintiffs' claims are barred by the applicable statutes of limitation;
3. the statements of defendant are true, concern matters of public interest, represent their honest opinion, and are not motivated by actual malice;
4. all statements of fact by defendant are true;
5. to the extent defendant's statements do not contain statements of fact, they are constitutionally protected expressions of opinion; and
6. this Court lacks subject matter jurisdiction.

"the Leopard Ad" and "the Tiger Ad", or sometimes collectively as "the ads".[4]

As evidentiary hearing has been held, and proof of the parties has been received. Pending disposition of this motion, or until Noon on Friday, September 21, 1973, the parties have stipulated that the Tiger Ad could be exhibited and such exhibition has been continuing since about September 8, 1973, but that the Leopard Ad would be withheld from public view in order that the Court might dispose of the motion, or, alternatively, determine whether a temporary restraining order should be issued pending disposition of the motion.[5]

Under all the circumstances of this litigation, it appears appropriate to consolidate the hearing with respect to the preliminary injunction motion with a trial on the merits pursuant to Rule 65(a)(2), F.R.Civ.P., and it is so ordered.

Tigers and Leopards, together with Jaguars, Ocelots and others listed in 50 C.F.R. § 17, Appendix A (1970), as

4 Plaintiffs' prayer for relief was

"1. [t]hat defendant . . . be enjoined and restrained . . . during the pendency of this action and thereafter perpetually: (a) from falsely implying or representing . . . that plaintiffs . . . are responsible in any manner for killing tigers, leopards or importing or using in any way the fur of such animals; (b) from falsely implying or representing . . . that plaintiffs . . . are responsible in any manner for the illegal killing of wildlife of any kind; (c) from falsely implying or representing . . . that the purchasing of defendants goods will in any manner save the lives of tigers, leopards or any endangered species of wildlife.

2. That defendant be required to account for and pay over to plaintiffs . . . any and all profits derived by it and all damages sustained by plaintiffs by reason of defendant's acts. . . ."

5 If not restrained, defendant proposes to exhibit both Ads to the New York market and elsewhere at least daily through the week of October 1, 1973, and has made contracts with broadcasters for this presentation.

amended, are endangered species threatened with extinction. Pursuant to the Mason Act, also known as the Endangered Species Conservation Act of 1969 (16 U.S.C. §§ 668aa through 668cc, inclusive), no person or corporation with exceptions not material here, may import into the United States any such endangered animal or its skin. Also the Lacey Act (18 U.S.C. § 43) prohibits interstate transportation of such furs, unlawfully taken by others.

These statutes carry severe criminal penalties. The net effect of the statutes and regulations promulgated thereunder by the Secretary of the Interior is that no plaintiff and no member of the purported class may cut, manufacture or sell furs of such endangered species, nor may any apparel be made or sold therefrom in the United States. The Government, by diligent enforcement, has obtained full compliance. It would be impossible as a practical matter for such high fashion apparel as tiger or leopard coats to be cut, manufactured or sold in the United States, even clandestinely. To do so would require the joint conspiratorial activities of too many persons, needed to design, prepare, assemble, sell and transport the contraband furs, and the risks are simply too great. A new tiger or leopard coats may not be purchased at this time in the United States.

Defendant suggests that it is possible in some of the backward areas of the world to purchase such a coat and for the customer to wear or carry it into the United States as personal clothing. No evidence was received in support of this unlikely suggestion, and the hypothesis is so far feteched that it may be disregarded.

The Court viewed these two Ads. They are produced in color. The fact that 40% of the New York market continues to view television in black and white was the signifi-

cant motivation for the choice of leopard (with contrasting spots) and tiger (with stripes) over a monochromatic fur.

The Leopard Ad, sixty seconds in length, begins with color scenes of animals in their natural habitat, including hippopotami swimming, antelopes running in a pack and a leopard with her cub.

The leopard is then viewed through what are apparently the sights of a large firearm. The scene fades. A gunshot is heard. The scene shifts tc a cocktail party ostensibly in the United States. A fashionably dressed woman admires the leopard coat of another. The voice of an unseen male speaks:

> Man's Voice: There are too many women who want leopard coats in the world and too few leopards. Timme makes fake furs every bit as beautiful as the originals. We think people should wear our fake fur and leave the leopards coats where they belcng, on leopards.
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> Woman: Buy me one before the jungle runs out of them.
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> Man's Voice: Timme. Makers of Timmetation Fake Furs, and fabrics for just about every thing else.

This is followed by a picture of examples of various other Timme fabrics used for upholstery and apparel.

The Tiger Ad, thirty seconds long, is to the same effect. A lovely girl appears in color next to a friendly and affectionate tiger. She says:

> He [the tiger] is wearing a real tiger coat. I'm wearing a fake fur by Timme. Although it's vir-

> tually impossible to tell the difference, a Timme fur costs far less money. Perhaps even more important, it didn't cost a tiger his life. The beauty of a Timme fake is that you can wear a beautiful coat and he [the tiger] can keep his.

This is followed by the voice of an unseen male, naming Timme as a maker of fake furs and fabrics.

Words are inadequate to describe the mordant effect of these Ads on the viewer. In the Leopard Ad, a woman of fashion makes an insensitive reference to the fact that leopards are threatened with extinction, and requests her escort (not shown on camera) to buy her one before it is too late. Her self-indulgent attitude and frivolous demeanor contrasts directly and unfavorably with the words and tone of the ecologist-announcer.

Persons who would wear natural tiger or leopard coats [and, by extension, all who would wear natural fur] are portrayed as anti-social, anti-environment, or otherwise in a bad light. The two-fold innuendo exists: (1) by selecting Timmetation fur over natural fur, a customer will save money and save the life of a fur bearing animal, and (2) that the American fur industry is responsible for the killing of endangered tigers and leopards, [and, by extension, are criminals].

As to the tigers and leopards, this representation is, of course, false. To the extent that the Ads imply a customer has a choice between real and artificial tiger and leopard fur, the Ads are also false. If the fur portrayed were a natural fur not listed as an endangered species by the Department of the Interior, for example, beaver, rock

seal, rabbit, mink or chinchilla, the Ads arguably would be true.[6]

The admitted reason defendant's advertising agency used tiger and leopard instead of rock seal, mink, rabbit or beaver, also made by Timme, is that these endangered animals, striped and spotted, look better on black and white television than the nomochromatic natural furs, which lawfully may be slaughtered, dressed, manufactured and sold for apparel in the United States.

The American fur industry has been attacked relentlessly by persons involved in the now fashionable ecology and environmentalist movement in the country, and has been deprecated by various public figures and leaders of opinion.

Among the various opinions and emotional causes in this country there are many vocal persons who regard nature and animals with greater affection than they have for their fellow creatures. Some will not eat meat because it entails the slaughtering of animals, and many are "against fur". They believe, in accord with now fashionable ecology, that no wild animals of any species should be slaughtered for their skins, and, indeed, there are elements of public opinion who are also opposed to the use of cultured or ranch raised fur. Since fur is expensive, compared with other clothing, consumer acceptance depends upon fashion and a public view of desirability.

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6 The fur industry argues that synthetic yarns consume, forever, resources such as natural gas, and causes air and water pollution. It claims that non-endangered furs are renewable, and that the economic value of pelts is an inducement to the preservation of a favorable environment for their growth. The lines are drawn, upon value issues, as to which reasonable [and unreasonable] men may differ.

Faced with these many difficulties, the American fur industry has organized, and assessed itself to fund a public relations and advertising campaign carrying its arguments into the marketplace of ideas. Its campaigns, of necessity, have been for the most part defensive. Its public relations consultant has met with resistence on the part of those persons characterized as the "media", who control what is printed or broadcasted. Many of such persons are in the vanguard of the environmentalist movement, and they are "against fur". See testimony of plaintiffs' expert, Mr. Edward M. Stanton, September 18, 1973 transcript at p. 172.

In defendant, we have an advertiser seeking to capitalize on two of the great issues of our time, ecology and environmentalism. It would exploit these issues for profit, at the expense of plaintiffs' good will in order to make the use of its fabrics more fashionable, and at the same time, make the wearing of furs unfashionable or undesirable.

Plaintiffs' expert witness Stanton conceded, however, p. 169, that the American public, in considering the issue of whether it is appropriate to wear fur apparel in these times, does not distinguish in its mind between fur of endangered species, fur of wild species not endangered [whose economic value often impels their preservation], and fur raised on farms. Probably the Timme ads could be rendered arguably truthful, if, instead of an endangered species, the animals shown were those wild animals which lawfully may be taken for fur in the United States. The effect on plaintiffs of such a change would be minimal.

Do the Ads violate the Lanham Act? Plaintiffs urge that they do because they represent, falsely, that the American fur industry kills endangered species.

Memorandum and Order of Brieant, J.

This is not, however, a false representation or description as to *defendant's* goods. The evil sought to be remedied was not the unjustified disparagement of the competitors' goods, but deceit or palming off with respect to the advertisers' own goods. While the Lanham Act has been interpreted to afford relief for a broad range of anticompetitive practices beyond those actionable at common law, not all unfair practices are prohibited by §43(a). *Holsten Import Corp.* v. *Rheingold Corp.*, 285 F.Supp. 607 (S.D.N.Y. 1963); *Bernard Food Industries, Inc.* v. *Dietene Company*, 415 F. 2d 1279 (7th Cir.), *cert. denied*, 397 U.S. 912 (1969); *Smith Victor Corp.* v. *Sylvania Electric Products, Inc.*, 242 F.Supp. 302, 310 (N.D. Ill. 1965); *Gold Seal Co.* v. *Weeks*, 129 F.Supp. 928, 940 (D.D.C. 1955), *aff'd. sub. nom. S.C. Johnson & Son, Inc.* v. *Gold Seal Co.*, 230 F.2d 832 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 829 (1956).

As stated in the *Gold Seal* case at p. 939 of 129 F.Supp.:

> "Some courts have read into the section [43(a) of the Lanham Act] the narrow common law 'property right' limitation to the effect that apart from trademark infringement and proof of 'palming off' misrepresentation by a tradesman concerning his product works no actionable injury upon his competitors.
>
> * * *
>
> It means that wrongful diversion of trade resulting from *false description of one's* [own] *products* invades that interest which an honest competitor has in fair business dealings—an interest which the courts should and will protect. . . ." (Underlining added.)

Memorandum and Order of Brieant, J.

Defendant's implication that endangered species are being killed for the sale of their skins in the American market, is at most a misrepresentation of the acts or products of others. As such, it does not represent an unfair competitive practice within the meaning of the Act.

A slightly different question is presented with respect to the false implication conveyed by defendant that buying defendant's product will prevent the killing of leopards and tigers. But this does not misrepresent an inherent quality or characteristic of defendant's product. Instead, it implies that the purchase of defendant's product will achieve the result of preventing leopards and tigers from being killed. The legislative history of the Act does not support plaintiff's view that such misrepresentation is within the purview of §43(a). Plaintiffs cited no authority which has so applied it.

Even advertisers enjoy first amendment rights, although it is said that product advertising is "less vigorously protected . . . than other forms of speech." *Capital Broadcasting Co.* v. *Mitchell*, 333 F.Supp. 582, 584, *aff'd* 405 U.S. 1000. *Banzhaf* v. *F.C.C.*, 405 F.2d 1082, *cert. denied sub nom. American Broadcasting Companies* v. *F.C.C.*, 396 U.S. 842 (1969); *Robinson* v. *American Broadcasting Companies*, 441 F.2d 1396 (6th Cir. 1971).

While Congress may limit such rights to prevent fraud, copyright infringement or palming off, such limitation must be drawn narrowly, so as to meet the perceived evil, without unnecessary impingement on the right of free speech. This is particularly important in the case of in-

stitutional advertising, as this is, which is usually combined with a public relations campaign.[7]

Perhaps Congress could forbid the wilful and false disparagement of an entire industry, but it has not done so. At least where matters of public interest are involved, there could, because of first amendment limitations, be no prior restraint of the sort here sought. *Robinson* v. *American Broadcasting Companies*, 441 F.2d 1396, 1400 (6th Cir. 1971); *Krebiozen Research Foundation* v. *Beacon Press*, 334 Mass. 86, 134 N.E.2d 1, *cert. denied* 352 U.S. 848.

As Mr. Justice Douglas, concurring in *Cammarano* v. *United States*, 358 U.S. 498, 514 (1958) wrote:

> "That 'freedom of speech or of the press,' directly guaranteed against encroachment by the Federal Government and safeguarded against state action by the Due Process Clause of the Fourteenth Amendment, is not by terms or by implication confined to discourse of a particular kind and nature. It has often been stressed as essential to the exposition and exchange of political ideas, to the expression of philosophical attitudes, to the flowering of the letters. Important as the First Amendment is to all those cultural ends, it has not been restricted to them. * * * The profit motive should make no difference, for that is an element inherent in the very

7 In this context "Public Relations" may be defined as getting the advertising message across as news, features, editorial comment, [e.g. a report of a newsworthy speech made to a trade association about endangered species, or about the fur industry's attempts to foster conservation]. It is cheaper than advertising and carries greater credibility. According to plaintiffs' expert Stanton, bias against fur in the media makes it difficult for the fur industry to present its side of this important public issue.

> conception of a press under our system of free enterprise. Those who make their living through exercise of First Amendment rights are no less entitled to its protection that those whose advocacy or promotion is not hitched to a profit motive. We held as much in *Follett* v. *McCormick*, 321 U.S. 573. And I find it difficult to draw a line between that group and those who in other lines of endeavor advertise their wares by different means. Chief Justice Hughes speaking for the Court in *Lovell* v. *Griffin*, 303 U.S. 444, 452, defined the First Amendment right with which we now deal in the broadest terms. 'The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.' "

Recourse may not be had to the Courts to resolve the public issue raised by Timme's ads, notwithstanding their falsity.

The relief sought may not be granted, because neither the Lanham Act, nor any other statute, so provides, and because the First Amendment prevents. Although the defense to this action has by tradition, been phrased in terms of "lack of subject matter jurisdiction", as Mr. Justice Black pointed out [*Calhoon* v. *Harvey*, 379 U.S. 134 at fn. 9, p. 137] in actuality, there has been a failure to state a claim upon which, according to substantive law, relief may be granted, and not a failure of subject mater jurisdiction. The result is that whether for failure to state a claim, or for want of subject matter jurisdiction, the first cause of action must be dismissed. Timme and the furriers must be left to fight their battle in "an uninhibited marketplace of ideas where truth will ultimately prevail" (quoted from

Red Lion Broadcasting Co. v. *F.C.C.*, 395 U.S. 367 at 390 (1968).

Assuming the Court could grant injunctive relief, sound reasons prevent doing so. If such relief were limited to curing the falsity in the Ads, so that they might still be produced, on the same theme, using a non-endangered species, the benefit to the fur industry would be slight. Plaintiffs' public relations expert, Stanton, testified (p. 181 of September 18, 1973 transcript) that his function "in this current campaign that [he was] assisting the fur people with is designed to resist the overall impact of the conservation movement, the animal lovers, the overall guilt approach that has set in on the use of live animal skins."

Timme, if so enjoined, would have the timing of its fall advertising campaign disrupted, and will expend in excess of $45,000 to produce new commercials. (p. 25 of September 10, 1973 transcript.)

Neither plaintiffs, nor their purported class can show damage flowing solely from Timme's acts, rather than from the concurrent acts of environmentalists attacking the wearing of furs. Annual fur garment sales depend on many variables, including fashion acceptance of new designs, costs of production, interest rates, consumer prosperity and the supply of raw material, so that it cannot be said that defendant's activities are or will be directly causative of any financial damage, or financial damage in any particular amount. There are such a number of independent actors, operating jointly, that to enjoin Timme while the others lawfully may continue to enjoy their first amendment rights, would be foolish.

Memorandum and Order of Brieant, J.

This leaves us with the second cause of action pleaded, which charges tortious conduct under New York law.

As a matter of discretion [*Cf. Leather's Best* v. *S.S. Mormaclynx*, 451 F.2d 800, 809 (2d Cir. 1971)], we had best decline to exercise pendent jurisdiction and leave for resolution by the state court the question whether, under state law a justiciable issue is presented. *Cf. Schutzman* v. *News Syndicate Co.*, 60 Misc.2d 827, 304 N.Y.S.2d 167; *Fashion Two Twenty, Inc.* v. *Steinberg*, 339 F.Supp. 836 (E.D.N.Y. 1971).

The Complaint is dismissed, and the motion for injunctive relief is denied. The foregoing constitutes finding of fact and conclusions of law pursuant to Rule 52, F.R. Civ.P.

The Clerk shall enter final judgment that all relief shall be denied, pursuant to Rule 58, F.R.Civ.P.

Dated: New York, New York
September 21, 1973

CHARLES L. BRIEANT, JR.
U. S. D. J.

AMENDMENT I OF THE CONSTITUTION OF THE UNITED STATES

Congress shall make no law *respecting an establishment* of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

15 U.S.C. 1125(a)

(a) Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

16 U.S.C. 1531 *et seq.*

(The provisions of sections 668aa to 668cc—6, which, pursuant to section 12(d) of Pub. L. 91-135, were known as the "Endangered Species Conservation Act of 1969", are now covered by section 1531 et seq. of this title.)

. . . § 1533

(a) (1) The Secretary shall by regulation determine whether any species is an endangered species or a threatened species because of any of the following factors:

(1) the present or threatened destruction, modification, or curtailment of its habitat or range;

(2) overutilization for commercial, sporting, scientific, or educational purposes;

(3) disease or predation;

(4) the inadequacy of existing regulatory mechanisms; or

(5) other natural or manmade factors affecting its continued existence.

* * *

(b) (1) The Secretary shall make determinations required by subsection (a) of this section on the basis of the best scientific and commercial data available to him and after consultation, as appropriate, with the affected States, interested persons and organizations, other interested Federal agencies, and, in cooperation with the Secretary of State, with the country or countries in which the species concerned is normally found or whose citizens harvest such species on the high seas; except that in any case in which such determinations involve resident species of fish or wildlife, the Secretary of the Interior may not add such species to, or remove such species from, any list published pursuant to subsection (c) of this section, unless the Secretary has first—

(A) published notice in the Federal Register and notified the Governor of each State within which

such species is then known to occur that such action is contemplated;

(B) allowed each such State 90 days after notification to submit its comments and recommendations, except to the extent that such period may be shortened by agreement between the Secretary and the Governor or Governors concerned; and

(C) published in the Federal Register a summary of all comments and recommendations received by him which relate to such proposed action.

(2) In determining whether or not any species is an endangered species or a threatened species, the Secretary shall take into consideration those efforts, if any, being made by any nation or any political subdivision of any nation to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under the jurisdiction of any such nation or political subdivision, or on the high seas.

(3) Species which have been designated as requiring protection from unrestricted commerce by any foreign country, or pursuant to any international agreement, shall receive full consideration by the Secretary to determine whether each is an endangered species or a threatened species.

Lists

(c) (1) The Secretary of the Interior shall publish in the Federal Register, and from time to time he may by regulation revise, a list of all species determined by him or the Secretary of Commerce to be endangered species and a list of all species determined by him or the Secretary of

Commerce to be threatened species. Each list shall refer to the species contained therein by scientific and common name or names, if any, and shall specify with respect to each such species over what portion of its range it is endangered or threatened.

* * *

Protective regulations

(d) Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538 (a) (1) of this title, in the case of fish or wildlife, or section 1538(a) (2) of this title, in the case of plants, with respect to endangered species; except that with respect to the taking of resident species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to section 1535(a) of this title only to the extent that such regulations have also been adopted by such State.

§ 1538. Prohibited acts—Generally

(a) (1) Except as provided in sections 1535(g) (2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

(2) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of plants listed pursuant to section 1533 of this title, it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from, the United States;

(B) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(C) sell or offer for sale in interstate or foreign commerce any such species; or

(D) violate any regulation pertaining to such species or to any threatened species of plants listed pursuant to section 1533 of this title and promul-

gated by the Secretary pursuant to authority provided by this chapter.

18 U.S.C. § 43

Whoever delivers, carries, transports, ships, by any means whatever, or knowingly receives for shipment, to or from any State, territory, the District of Columbia, the Commonwealth of Puerto Rico, any possession of the United States, or any foreign country, any wild mammal or bird of any kind, or the dead body or parts thereof, or the offspring or eggs therefrom, as the case may be, which was captured, killed, taken, purchased, sold, or otherwise possessed or transported in any manner contrary to any Act of Congress or regulation issued pursuant thereto or contrary to the laws or regulations of any State, territory, the District of Columbia, the Commonwealth of Puerto Rico, possession of the United States, or foreign country; or

Whoever receives, acquires, or purchases, knowingly, any such wild mammal or bird of any kind or the dead body or parts thereof, or the offspring or eggs therefrom, which was so transported, delivered, carried, or shipped by any means whatsoever, as aforesaid; or

Whoever, having acquired any of the foregoing properties which was so transported, delivered, carried, or shipped by any means whatever, as aforesaid, makes any false record, account, label or identification thereof; or

Whoever imports from or exports to Mexico any game mammal, dead or alive, or parts or products thereof, except under permit or authorization of the Secretary of the Interior, in accordance with regulations issued by him and approved by the President—

Shall be fined not more than $500 or imprisoned not more than six months, or both; and the wild animals or

birds, or the dead bodies or parts thereof, or the eggs of such birds, shall be forfeited.

As amended Sept. 2, 1960, Pub. L. 86-702, § 2, 74 Stat. 754.

28 U.S.C. 1338

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.

(b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trade-mark laws.

C.F.R. § 17, APPENDIX A (1973)

U.S. LIST OF ENDANGERED FOREIGN FISH AND WILDLIFE

The list of endangered foreign fish and wildlife has been compiled from data supplied nternational conservation organizations, foreign fish and wildlife agencies, individual ntists, and trade sources. If a candidate species is not listed, it may be because it is endangered throughout its range or because there is insufficient evidence to warrant nclusion on the list at this time. The list is under continual review. Factual data are eme and should be submitted. The "Where found" column is a general guide to the e countries or regions where the named animals are found. It is not intended to be itive. The use of a trinomial (third name) in the Scientific Name indicates there are or more subspecies of the animal which are not endangered.

MAMMALS

Common name	Scientific name	Where found
hern planigale	*Planigale tenuirostris*	Australia.
planigale	*Planigale subtilissima*	Do.
ler	*Antechinus apicalis*	Do.
e desert marsupial-mouse	*Sminthopsis psammophila*	Do.
tailed marsupial-mouse	*Sminthopsis longicaudata*	Do.
ern jerboa-marsupial	*Antechinomys laniger*	Do.
rn native-cat	*Dasyurus viverrinus*	Do.

50 C.F.R. § 17, APPENDIX A (1973) cont'd.

Common name	Scientific name	Where found
Tasmanian tiger	*Thylacinus cynocephalus*	Do.
Numbat	*Myrmecooius fasciatus*	Do.
Barred bandicoot	*Perameles bougainville*	Do.
Rabbit-bandicoot	*Macrotis lagotis*	Do.
Lesser rabbit-bandicoot	*Macrotis leucura*	Do.
Pig-footed bandicoot	*Chaeropus ecaudatus*	Do.
Desert bandicoot	*Perameles eremiana*	Do.
Mountain pigmy-possum	*Burramys parvus*	Do.
Scalytailed possum	*Wyulda squamicaudata*	Do.
Queensland hairy-nosed wombat.	*Lasiorhinus gillespiei*	Do.
Barnard's wombat	*Lasiorhinus barnardi*	Do.
Brush-tailed rat-kangaroo	*Bettongia penicillata*	Do.
Gaimards rat-kangaroo	*Bettongia gaimardi*	Do.
Lesueur's rat-kangaroo	*Bettongia lesueur*	Do.
Queensland rat-kangaroo	*Bettongia tropica*	Do.
Plain rat-kangaroo	*Caloprymnus campastris*	Do.
Banded hare-wallaby	*Lagostrophus fasciatus*	Do.
Western hare-wallaby	*Lagochestes hirsutus*	Do.
Bridled nail-tail wallaby	*Onychogalea frenata*	Do.
Crescent nail-tail wallaby	*Onychogalea lunata*	Do.
Parma wallaby	*Macropus parma*	Do.
Yellow-foot rock wallaby	*Petrogale ranthopus*	Do.
Tasmanian forester	*Macropus giganteus tasmaniensis.*	Do.
Quokka	*Setonix brachyurus*	Do.
Cuban solenodon	*Atopogale cubana*	Cuba.
Haitian solenodon	*Solenodon paradoxus*	Dominican Republic.
Lemurs—all species	Lemuridae, all members of the genera *Lemur, Hapalemur, Lepilemur, Cheirogaleus, Microcebus, Phaner.*	Madagascar and Comoro Islands.
Indris, sifakas, avahis—all species.	Indriidae, all members of the genera *Indri, Avahi, Propithecus.*	Do.
Aye-aye	*Daubentonia madagascariensis*	Madagascar.
Spider monkey	*Ateles geoffroyi frontatus*	Costa Rica, Nicaragua.
Do	*Ateles geoffroyi panamensis*	Costa Rica, Panama.
Red-backed squirrel monkey	*Saimiri oerstedii (Saimiri sciureus oerstedii).*	Do.
Woolly spider monkey	*Brachyteles arachnoides*	Brazil.
White-nosed saki	*Chiropotes albinasus*	Do.

50 C.F.R. § 17, APPENDIX A (1973) cont'd.

Common name	Scientific name	Where found
Uakari—all species	*Cacajao spp*	Peru, Colombia, Venezuela, Brazil, Ecuador.
Goeldi's marmoset	*Callimico goeldii*	Brazil, Colombia, Ecuador, Peru.
Golden-rumped tamarin, golden-headed tamarin, golden lion marmoset.	*Leontideus spp*	Brazil.
Lion-tailed macaque	*Macaca silenus*	India.
Tana River mangabey	*Cercocebus galeritus galeritus*	Kenya.
Douc langur	*Pygathrix nemaeus*	Indochina (Hainan Island), China.
Pagi Island langur	*Simias concolor*	Indonesia.
Red colobus	*Colobus badius rufomitratus*	Kenya.
Zanzibar red colobus	*Colobus badius kirkii*	Zanzibar (Tanzania).
Kloss' gibbon	*Hylobates klossi*	Indonesia.
Pileated gibbon	*Ilylobates pileatus*	Laos, Thailand, Cambodia.
Orangutan	*Pongo pygmaeus*	Indonesia, Malaysia, Brunei.
Gorilla	*Gorilla gorilla*	Central and Western Africa.
Brazilian three-toed sloth	*Bradypus torquatus*	Brazil.
Pink fairy armadillo	*Chlamyphorus truncatus*	Argentina.
Volcano rabbit	*Romerolagus diazi*	Mexico.
Mexican prairie dog	*Cynomys mexicanus*	Do.
False water-rat	*Xeromys myoides*	Australia.
New Holland mouse	*Pseudomys novaehollandiae*	Do.
Shark Bay mouse	*Pseudomys praeconis*	Do.
Gould's mouse	*Pseudomys gouldii*	Do.
Shortridge's mouse	*Pseudomys shortridgei*	Do.
Smoky mouse	*Pseudomys fumeus*	Do.
Western mouse	*Pseudomys accidentalis*	Australia.
Field's mouse	*Pseudomys fieldi*	Do.
Stick-nest rat	*Leporillus conditor*	Do.
Thin-spined porcupine	*Chaetomys subspinosus*	Brazil.
Bowhead whale	*Balaena mysticetus*	Oceanic.
Right whale	*Eubalaena spp*	Do.
Blue whale	*Balaenoptera musculus*	Do.
Sperm whale	*Physeter catodon*	Do.
Finback whale	*Balaenoptera physalus*	Do.
Sei whale	*Balaenoptera borealis*	Do.
Humpback whale	*Megaptera spp*	Do.
Gray whale	*Eschrichtius gibbosus*	Do.

50 C.F.R. § 17, APPENDIX A (1973) cont'd.

Common name	Scientific name	Where found
Northern kit fox	*Vulpes velox hebes*	Canada.
Asiatic wild dog	*Cuon alpinus*	U.S.S.R., India. (Central and Southeast Asia).
Mexican grizzly bear	*Ursus arctos nelsoni*	Mexico.
Formosan yellow-throated marten.	*Martes flavigula chrysospila*	Formosa.
Black-footed ferrit	*Mustela nigripes*	United States, Canada.
Cameroun clawless otter	*Paraonyx microdon*	Cameroons.
La Plata otter	*Lutra platensis*	Uruguay, Argentina, Bolivia, Brazil.
Maned wolf	*Chrysocyon brachyurus*	Brazil, Bolivia, Paraguay, Argentina.
Giant otter	*Pteronura brasiliensis*	South America.
Barbary hyaena	*Hyaena hyaena barbara*	Morocco.
Brown hyaena	*Hyaena brunnea*	Southern Africa.
Spanish lynx	*Felis lynx pardina*	Spain.
Barbary serval	*Felis serval constantina*	Algeria.
Formosan clouded leopard	*Neofelis nebulosa braychyurus*	Formosa.
Asiatic lion	*Panthera leo persica*	India.
Cheetah	*Acinonyx jubatus*	Africa, Asia Minor, India
Leopard	*Panthera pardus*	Africa, Asia Minor, India, Southeast Asia, Korea.
Tiger	*Panthera tigris*	Central Asia, China and Korea, to India, Indonesia and Malaysia.
Snow leopard	*Panthera uncia*	Central Asia.
Jaguar	*Panthera onca*	Central and South America.
Ocelot	*Felis pardalis*	Do.
Margay	*Felis wiedii*	Do.
Tiger cat	*Felis tigrina*	Costa Rica to northern South America.
Mediterranean monk seal	*Monachus monachus*	Mediterranean, Northwest African coast, and Black Sea.
Dugong	*Dugong dugon*	East Africa to Ryukyu Islands.
West Indian (Florida) manatee.	*Trichechus manatus*	Caribbean, northern South America.
Amazonian manatee	*Trichechus inunguis*	Amazon Basin.

50 C.F.R. § 17, APPENDIX A (1973) cont'd.

Common name	Scientific name	Where found
Asian wild ass	*Equus hemionus*	Pakistan, Iran, India, China, Afghanistan, Central Asia.
African wild ass	*Equus asinus*	Ethiopia, Somalia, Sudan.
Mountain tapir	*Tapirus pinchaque*	Colombia, Ecuador, Peru.
Brazalian tapir	*Tapirus terrestris*	Venezuela, Argentina, Brazil, Colombia.
Central American tapir	*Tapirus bairdii*	Southern Mexico to Colombia and Ecuador.
Sumatran rhinoceros	*Didermoceros sumatrensis*	Southeast Asia—East Pakistan to Vietnam to Indonesia, Borneo.
Javan rhinoceros	*Rhinoceros sondaicus*	Indonesia, Burma, Thailand.
Great Indian rhinoceros	*Rhinoceros unicornis*	India, Nepal.
Northern white rhinoceros	*Cerathotherium simum cottoni*	Congo (Kinshasa), Uganda, Sudan, Central African Republic.
Pygmy hog	*Sus salvanius*	India, Nepal, Bhutan, Sikkim
Vicuna	*Vicugna vicugna*	Peru, Bolivia, Argentina.
Swamp deer	*Cervus duvauceli*	India, Nepal.
Kashmir stag, hangul	*Cervus elaphus hanglu*	Kashmir.
Barbary stag	*Cervus elaphus barbarus*	Tunisia, Algeria.
McNeill's deer	*Cervus elaphus macneilli*	China, Tibet.
Shou	*Cervus elaphus wallichi*	Tibet, Bhutan.
Brow-antlered deer, Eld's deer	*Cervus eldi*	India, Southeast Asia.
Persian fallow deer	*Dama dama mesopotamica*	Iraq, Iran.
Bawean deer	*Helaphus kuhli (Cervus kuhli)*	Indonesia.
Marsh deer	*Blastocerus dichotomus*	Argentina, Uruguay, Brazil, Paraguay.
Sonoran pronghorn	*Antilocapra americana sonoriensis.*	Mexico, United States.
Black-faced impala	*Aepyceros melampus petersi*	Southwest Africa, Angola.
Swayne's hartebeest	*Alcelaphus buselaphus swaynei*	Ethiopia.
Anoa	*Anoa depressicornis*	Indonesia.
Tamaraw	*Anoa mindorensis*	Philippines.
Wood bison	*Bison bison athabascae*	Canada.
Seladang (gaur)	*Bos gaurus*	India, Southeast Asia, East Pakistan.

50 C.F.R. § 17, APPENDIX A (1973) cont'd.

Common name	Scientific name	Where found
Wild yak	*Bos grunniens mutus*	Tibet, India.
Kouprey	*Bos sauveli*	Cambodia.
Banteng	*Bibos banteng*	Southeast Asia.
Pyrenean ibex	*Capra pyrenaica pyrenaica*	Spain.
Walia ibex	*Capra walie*	Ethiopia.
Rio de Oro dama gazelle	*Gazella dama lozanoi*	Spanish Sahara.
Mhorr gazelle	*Gazella dama mhorr*	Morocco.
Moroccan dorcas gazelle	*Gazella dorcas massaesyla*	Morocco, Algeria.
Cuvier's gazelle	*Gazella cuvieri*	Morocco, Tunisia.
Slender-horned gazelle, Rhim, Loder's gazelle.	*Gazella leptoceros*	Sudan, Algeria, Egypt, Libya.
Black lechwe	*Kobus leche smithemani*	Zambia
Arabian Oryx	*Oryx leucoryx*	Arabian Peninsula.
Clark's gazelle, dibatag	*Ammodorcas clarkii*	Somalia, Ethiopia.

SUPREME COURT RULE 19(1)(b)

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: . . .

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

RULE 65 OF THE FEDERAL RULES OF CIVIL PROCEDURE

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing with Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a) (2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

* * *

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

SUPREME COURT, U.S.
Supreme Court, U.S.
OCT 10 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-295

FUR INFORMATION AND FASHION COUNCIL, INC., ASSOCIATED FUR MANUFACTURERS, INC., UNITED FUR MANUFACTURERS ASSOCIATION, INC., FUR WHOLESALERS ASSOCIATION OF AMERICA, INC., MASTER FURRIERS GUILD OF AMERICA, INC., FURRIERS JOINT COUNCIL, OLIVER GINTEL, INC., J. PALANKER & SONS and FREEDMAN-LEVY, INC.,

Petitioners,

v.

E. F. TIMME & SON, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CHARLES L. TROWBRIDGE
Counsel for Respondent
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DAVID E. NIERENBERG

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-295

FUR INFORMATION AND FASHION COUNCIL, INC., ASSOCIATED FUR MANUFACTURERS, INC., UNITED FUR MANUFACTURERS ASSOCIATION, INC., FUR WHOLESALERS ASSOCIATION OF AMERICA, INC., MASTER FURRIERS GUILD OF AMERICA, INC., FURRIERS JOINT COUNCIL, OLIVER GINTEL, INC., J. PALANKER & SONS and FREEDMAN-LEVY, INC.,

Petitioners,

v.

E. F. TIMME & SON, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Questions Presented for Review

Question No. 1 set forth on page 2 of the petition fails to disclose that the interpretation of Section 43(a) of the Lanham Act (15 U.S.C. Section 1125(a)) ascribed to the United States Court of Appeals for the Second Circuit was solely by way of dictum and that review of that interpretation by this Court would require a factual determination

that the Second Circuit committed clear error in unanimously holding that respondent's challenged advertisements contain no misrepresentations, either as to an inherent quality or characteristic of respondent's goods or otherwise.

Question No. 1, as stated, is further defective in that it erroneously asserts decisions of other Circuit Courts to have been contradictory to the Second Circuit's aforesaid interpretation.

Question No. 2 inaccurately describes the interpretation of the Court of Appeals below as a holding.

Question No. 3 is not presented on this record.

Question No. 4 incorrectly characterizes the decision of the Court of Appeals and pertains to a factual issue of importance only to the litigants herein.

Constitutional Provisions, Statutes and Rules Involved

Petitioners' quotation of Section 43(a) of the Lanham Act (15 U.S.C. Section 1125(a)) omits the title of that Section which is part of that enactment and may have a bearing on its interpretation.

The title reads:

> "VIII—False Designation of Origin and False Descriptions Forbidden."

Statement

Petitioners' statement of the case on page 4 of the petition characterizes respondent's two television commercials sought to be enjoined by petitioners in the courts below as violative of Section 43(a) of the Lanham Act (15 U.S.C. Section 1125(a)) as containing "false implications that the

buying of respondent's products would save tigers and leopards from being killed for use of their fur for garments and that petitioners and all those similarly situated are responsible for the illegal killing of said animals for commercial purposes".

The Second Circuit, after viewing the advertisements, unanimously held to the contrary, stating with respect to the District Court's finding that such false implications had been made:

> "We are convinced that these ads carry no implications, false or otherwise, that plaintiffs, including their union employees, go about the country illegally killing tigers and leopards for commercial purposes. In fact, the court is prepared to take judicial notice that the numbers of tigers and leopards in this country is limited to zoological gardens and itinerant circuses. Equally unrealistic is the thought that a potential purchaser of one of the defendant's imitation leopard coats makes the purchase with the thought that she (probably) is saving a leopard from being killed. To the contrary she knows that no real leopards are available—hence, if her desires compel her to appear in spots, she must resort to such imitation as is available. Furthermore, a cloth imitation of any fur is far less expensive and many purchasers for this reason are willing to compromise for less than the 'real thing'.
>
> The ads seem to this court to do no more than to tout, in a rather pointed fashion, the advantages of imitation over natural furs: The imitation furs resemble the real thing, are less expensive, and can be purchased without necessitating the death of a live animal. These representations are either true or acceptable puffing." (Petition, pp. 6-A, 7-A)

If the Second Circuit was correct in this factual determination, no question whatsoever of the interpretation of Section 43(a) is presented on this record.

The correctness of this interpretation is, we submit, plainly evident from the District Court's description of the advertisements as follows:

> "The Court viewed these two Ads. They are produced in color. The fact that 40% of the New York market continues to view television in black and white was the significant motivation for the choice of leopard (with contrasting spots) and tiger (with stripes) over a monochromatic fur.
>
> The Leopard Ad, sixty seconds in length, begins with color scenes of animals in their natural habitat, including hippopotami swimming, antelopes running in a pack and a leopard with her cub.
>
> The leopard is then viewed through what are apparently the sights of a large firearm. The scene fades. A gunshot is heard. The scene shifts to a cocktail party ostensibly in the United States. A fashionably dressed woman admires the leopard coat of another. The voice of an unseen male speaks:
>
> Man's Voice: There are too many women who want leopard coats in the world and too few leopards. Timme makes fake furs every bit as beautiful as the originals. We think people should wear our fake fur and leave the leopards' coats where they belong, on leopards.
>
> Woman: Buy me one before the jungle runs out of them.
>
> Man's Voice: Timme. Makers of Timmetation Fake Furs, and fabrics for just about everything else.
>
> This is followed by a picture of examples of various other Timme fabrics used for upholstery and apparel.
>
> The Tiger Ad, thirty seconds long, is to the same effect. A lovely girl appears in color next to a friendly and affectionate tiger. She says:
>
> He [the tiger] is wearing a real tiger coat. I'm wearing a fake fur by Timme. Although it's vir-

> tually impossible to tell the difference, a Timme fur costs far less money. Perhaps even more important, it didn't cost a tiger his life. The beauty of a Timme fake is that you can wear a beautiful coat and he [the tiger] can keep his.
>
> This is followed by the voice of an unseen male, naming Timme as a maker of fake furs and fabrics." (Petition, pp. 14-A—16-A)

The Petition Should Be Denied

The issue whether these advertisements contain any misrepresentations is a narrow, factual issue of limited importance involving no question of federal law and presents no special or important reason to warrant this Court's review.

Moreover, assuming *arguendo* that the advertisements do contain the misrepresentations alleged by petitioners and found to exist by the District Court, the interpretation of Section 43(a) upheld by both courts below, is not at variance with the interpretation given that section by other Circuit Courts.

Argument

In setting up the asserted conflict the petitioners array the interpretation of Section 43(a) of the Lanham Act expressed by the District Court and the Court of Appeals in the case at bar against the so-called "broad construction" (Petition at p. 19) said to be found in *L'Aiglon Apparel* v. *Lana Lobell, Inc.*, 214 F.2d 649 (3d Cir. 1954) and *Norman M. Morris Corp.* v. *Weinstein*, 466 F.2d 137 (5th Cir. 1972). Reliance is also placed upon *Chanel, Inc.* v. *Smith*, 178 U.S.P.Q. 630 (N.D. Cal. 1973) on remand from *Smith* v. *Chanel, Inc.*, 402 F.2d 562 (9th Cir. 1948). An analysis and comparison of the decisions relied upon by the petitioners reveals a harmony of construction rather than a divergency necessary for this Court to resolve.

In *L'Aiglon v. Lana Lobell, Inc., supra,* defendant was alleged to have used photographs of plaintiff's $17.95 dress in the literature advertising its $6.95 dress. It is clear that the representation arising from the use of the photograph of the more expensive dress falsely described or misrepresented the dress defendant was actually selling.

The reference to Section 761 of The Restatement of Torts as bearing "closest resemblance" to Section 43(a), *L'Aiglon v. Lana Lobell, Inc., supra,* 214 F.2d at 651, reinforces the conclusion that the Third Circuit was concerned with a misrepresentation that related to a quality of the goods defendant was selling. Section 761 provides that liability arises on the part of:

> "One who diverts trade from a competitor by fraudulently representing that the goods which he markets have ingredients or qualities which in fact they do not have but which the goods of the competitor do have, is liable to the competitor for the harm so caused, if,
>
> (a) when making the representation he intends that it should, or knows or should know that it is likely to, divert trade from the competitor. . . ."

Moreover, *L'Aiglon* v. *Lana Lobell, Inc., supra,* was decided fifteen years prior to *Bernard Food Industries, Inc. v. Dietene Co.,* 415 F.2d 1279 (7th Cir. 1969), *cert. den.* 397 U.S. 912 (1970), one of the decisions relied upon by the Second Circuit in the case at bar as support for the proposition that Section 43(a) "was intended to apply only to misrepresentations relating to the inherent qualities of defendant's own goods", Petition, p. 8-A.

Significantly, in *Bernard Foods Industries, Inc.* v. *Dietene Co., supra,* this Court was petitioned and refused to grant a writ of certiorari. Any conflict of opinion arising from the proposition for which *Bernard Foods Industries, Inc.* v. *Dietene Co., supra,* was relied upon below and the construction in *L'Aiglon v. Lana Lobell, Inc., supra,* was before this Court when certiorari was refused in 1970. No reason is

suggested by the present petition why this Court shou'd reconsider, in effect, in the premises of the instant case, the denial of certiorari in *Bernard Foods Industries, Inc.* v. *Dietene Co., supra.*

In *Norman M. Morris Corp.* v. *Weinstein, supra,* it was found that defendant misrepresented Omega watches sold by him as guaranteed by Omega Watch Company, whereas the serial numbers essential to the existence of such guarantee had been removed by defendant from his watches. The Fifth Circuit further found that it was "perfectly clear, under evidence that was before the trial court which was free from dispute, that Weinstein gave false descriptions and made false representations *with respect to the watches he sold . . .*" 466 F.2d at 142 (emphasis added).

Petitioners' reliance upon *Chanel, Inc.* v. *Smith,* 178 U.S.P.Q. 630 (N.D. Cal. 1973), on remand from *Smith* v. *Chanel, Inc.,* 402 F.2d 562 (9th Cir. 1968), is misplaced.

In footnote 7 at page 13 of the petition, it is incorrectly stated that one of the misrepresentations by the defendant in that case, to the effect that it had taken defendant years to find the secret of duplicating the plaintiff's perfume known as "Chanel No. 5", was held to have violated Section 43(a). The misrepresentations in that case which were held to violate Section 43(a) were that the defendant had perfectly duplicated the exact scent of Chanel No. 5 and that this had been accomplished by a "masterful breakdown" of plaintiff's perfume and cologne (conclusions of law Nos. 11 and 12). The misrepresentation regarding the years of searching for the secret of duplicating Chanel No. 5 was contained in conclusion of law No. 13.

The last paragraph of the quotation from that decision set forth in petitioner's footnote 7, reads as follows:

> "With respect to *each* of such misrepresentations * * * defendant is in violation of California Civil Code § 3369 and in *violation* of 15 U.S.C. § 1125(a)." (Emphasis added)

In the space occupied by the three asterisks in the above quotation, the California District Court expressly limited the finding of violation of Section 43(a) to conclusions of law Nos. 10, 11 and 12 and did not hold Section 43(a) to be violated by the misrepresentation regarding the years of searching for the secret of duplicating Chanel No. 5.

Thus, *Chanel, Inc.* v. *Smith, supra,* as regards Section 43(a), was limited to the defendant's misrepresentation that the scent of its perfume was equivalent to that of plaintiff's perfume.

Thus, the Third Circuit in *L'Aiglon* v. *Lana Lobell, Inc., supra,* the Fifth Circuit in *Norman M. Morris Corp.* v. *Weinstein, supra,* the Seventh Circuit in *Bernard Foods Industries* v. *Dietene Co., supra,* and the First Circuit in *Samson Crane Co.* v. *Union National Sales, Inc.,* 180 F.2d 896 (1st Cir. 1950) *aff'g* 87 F. Supp. 218 (D Mass. 1949) each regarded an actual misrepresentation by defendant of a property of its goods to be essential to a finding of a violation of Section 43(a). The dictum of the Second Circuit in the case at bar merely follows the uniform interpretation of Section 43(a) by the other Circuits. There is no conflict to resolve.

Since reversal of the Second Circuit's unanimous factual determination that respondent's advertisements contain no misrepresentations is required in order for the application of Section 43(a) to be considered, and in view of the substantial harmony between prior circuit court interpretations of that section and that of the court below, we respectfully submit that no special and important reasons for review on writ of certiorari are presented by this record.

CONCLUSION

For the foregoing reasons we submit that the petition for a writ of certiorari herein should be denied.

Respectfully submitted,

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